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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DAVID KEEL et al.,

Plaintiffs and Respondents,

v.

BMG ENTERTAINMENT et al.,

Defendants and Appellants.

B164476

(Los Angeles County  
Super. Ct. No. BC276505)

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MATTHEW DICKEY et al.,

Plaintiffs and Respondents,

v.

UNIVERSAL MUSIC GROUP et al.,

Defendants and Appellants.

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(Los Angeles County  
Super. Ct. No. BC275602)

APPEAL from an order of the Superior Court of Los Angeles County, Peter D. Lichtman, Judge. Affirmed.

Munger, Tolles & Olson, Glenn D. Pomerantz, Steven B. Weisburd, and Paul J. Watford for Defendant and Appellant Universal Music Group, Inc.

Quinn Emanuel Urquhart Oliver & Hedges, A. William Urquhart, Shon Morgan, and Kristen Bird for Defendant and Appellant Warner Music Group, Inc.

Mitchell Silberberg & Knupp, Russell J. Frackman, and David A. Steinberg for Defendants and Appellants BMG Music and Sony Music Entertainment Inc.

Sidley Austin Brown & Wood, Peter I. Ostroff, James M. Harris, and Rollin A. Ransom for Defendant and Appellant EMI Recorded Music, North America.

Milberg Weiss Bershad Hynes & Lerach, William S. Lerach, Darren J. Robbins, Kevin K. Green; Nicholas Koluncich III; Robbins Umeda & Fink, Brian J. Robbins, Jeffrey P. Fink; and Rosner, Law & Mansfield, Alan M. Mansfield and Jessica K. Fawver for Plaintiffs and Respondents.

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## I. INTRODUCTION

In this consolidated appeal, defendants, Universal Music Group, Inc., BMG Music, Sony Music Entertainment Inc., Warner Music Group, Inc., and EMI Recorded Music, North America, five manufacturers of compact discs containing music recordings challenge the trial court's order denying their special motions to strike two complaints brought by plaintiffs, Matthew Dickey and Elizabeth Koluncich in Los Angeles Superior Court case No. BC275602 and David Keel, Josh Nichols, and Dennis Gregory in Los Angeles Superior Court case No. BC276552 pursuant to Code of Civil Procedure<sup>1</sup> section 425.16. The complaints, which are substantially similar, allege that defendants used copy protection technology on the compact discs without disclosure to consumers. We affirm the trial court's order denying the special motion to strike.

## II. BACKGROUND

The Dickey-Koluncich complaint contains causes of action for: violation of the Consumer Legal Remedies Act, Civil Code section 1750 et seq. (first); violation of the Business and Professions Code section 17200 et seq. (second); express and implied warranties breach (third); negligent misrepresentation (fourth); and unjust enrichment and declaratory relief (fifth). The Keel-Nichols-Gregory complaint contains causes of action for: violation of the Business and Profession Code 17200 et seq. (first); negligent misrepresentation (second); unjust enrichment and declaratory relief (third); and express and implied warranties breach (fourth).

The complaints, which were both filed on June 12, 2002, alleged that: defendants manufacture, advertise, and sell defective audio discs; defendants failed to disclose to California consumers that the discs are encrypted with digital technology

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

which prevents copying; the technology impacts the quality of the discs which results in inferior playback quality; the defective discs can without warning “crash” personal and Macintosh computers and can cause errors in CD players, digital video disc players, car stereos and digital video games consoles; and defendants have used the “‘CD’ logo” on their products which misrepresents that the discs are “conventional CDs that comply with the universally accepted ‘Compact Disc’ standard.” Plaintiffs alleged that it was misleading to sell the defective discs with the CD logo without disclosing the presence of copy protection technology. According to the complaints, consumers expect the CDs to comply with the universal standard. The universal standard CDs can be played on all devices and used to make legally authorized copies of the music. Plaintiffs alleged that consumers were entitled to make personal copies of the music on the discs pursuant to the Audio Home Recording Act of 1992, 17 United States Code section 101 et seq. To compensate the copyright owners, royalties of one to nine percent are paid upon the wholesale price of any digital audio recording device and three percent on all digital recording media.

On August 12, 2002, defendants filed two special motions to strike. Defendants argued that section 425.16 required that the actions be dismissed because the claims all arose from defendants’ commercially protected speech activities under the First Amendment of the United States Constitution. This was because plaintiffs were attacking the nature and sufficiency of defendants’ statements and disclosures to the public on their product labels and advertising including inadequate disclosures and a misleading use of the CD logo on the labels. Defendants asserted this is constitutionally protected commercial speech. In addition, defendants argued that plaintiffs challenges to the labels and advertisements related to the products itself, recorded music, which is likewise constitutionally protected.

Plaintiffs initially sought leave to amend their complaints. However, the trial court denied the motion for leave to amend. The trial court ruled that allowing the plaintiffs to amend the two complaints after the special motions to strike were filed

would violate the holding of *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1071, 1074.

On November 27, 2002, plaintiffs filed a consolidated opposition to the motions to strike. Plaintiffs argued: defendants misconstrued the complaints' allegation as a claims about CDs; however, plaintiffs argued the audio discs at issue are not CDs; the complaints were not about copy protection; rather, the complaints sought remedies for defendants' failure to disclose to California consumers that the audio discs contain read errors or incorrect date or codes; this software adversely affected the qualities or characteristics of discs; and this in turn impacted the consumers' ability to play, backup, or replicate the disc in certain playback devices or negatively affected the music quality.

Plaintiffs further argued that: defendants could not meet their burden of establishing their conduct arose from a protected form of speech; the act of disseminating a defective audio disc without disclosing the presence of the defects is not itself an act in the furtherance of free speech in connection with a public issue; they were not challenging the words or music contained on the discs; rather, defendants sold the audio discs as regular CDs with incorrect data without disclosures, which was not protected conduct. Plaintiff also argued that defendants could not establish that a public interest was at stake because the complaints did not: seek to limit or prohibit defendants from participating in public debate concerning the issues of copy protection; seek to determine whether copy protection is good or bad; or challenge any speech made by defendants in connection with the debate over copy protection.

The trial court denied the special motion to strike on the ground defendants failed to meet the threshold showing that the claims arise from any act in the exercise of the right to speech or petition in connection with a public issue or matter of public interest. The trial court noted that the right not to speak is constitutionally protected. But the trial court rejected defendants' claims that the product labels and advertising in this case were made in connection with an issue of public issue or of public interest. The trial court concluded: "Simply put, this Court finds that Plaintiffs do not attack defendants'

speech. Rather, plaintiffs are challenging defendants' failure to warn consumers about the presence of defects in their audio discs." This timely appeal followed.

### III. DISCUSSION

#### A. Standard of Review and Burdens of Proof

A special motion to strike may be filed in response to "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court, supra*, 27 Cal.App.4th at p. 815, fn. 2, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Section 425.16, which was enacted in 1992, authorizes a court to summarily dismiss such meritless suits. (Stats. 1992, ch. 726, § 2, pp. 3523-3524.) There is no requirement though that the suit be brought with the specific intent to chill the defendant's exercise of free speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at pp. 58-67.) The purpose of the statute was set forth in section 425.16, subdivision (a), as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ."

Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . ." in connection with a public issue must be stricken unless the courts finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra*, 47 Cal.App.4th at p. 783.) Section 425.16, subdivision (e) provides: "As used in

this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” In order to protect the constitutional rights of petition and free speech, the statute is to be construed broadly. (§ 425.16, subd. (a); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1176.)

When a special motion to strike is filed, the trial court must consider two components. First, the moving party has the initial burden of establishing a prima facie case that the plaintiff’s cause of action arose out of the defendant’s actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1123, fn. 10; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 673; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-1043; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, *supra*, 47 Cal.App.4th at p. 784; *Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at pp. 819-821.) Section 425.16 does not apply to every claim which may have some tangential relationship to free expression or petition rights. The Supreme Court has held: “[Section 425.16] cannot be read to mean that ‘any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct in exercise of those rights.’ [Citations.]” (*City of Cotati v.*

*Cashman* (2002) 29 Cal.4th 69, 76-77, quoting *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1002, original italics.) Quoting from *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at page 1002, the Supreme Court in *City of Cotati v. Cashman, supra*, 29 Cal.4th at page 77 explained: “California courts rightly have rejected the notion ‘that a lawsuit is adequately shown to be one “arising from” an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.’ [Citation.]” A defendant who meets the burden of showing the cause of action arises out of the exercise of the rights of petition or free speech has no additional burden of proving either plaintiff’s subjective intent to chill (*City of Cotati v. Cashman, supra*, 29 Cal.4th at pp. 74-76; *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at pp. 58-68) or a chilling effect. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at pp. 74-76.)

Second, once the defendant establishes the complaint’s claims arise out of the exercise of petition or free expression rights, the burden shifts to plaintiff. The plaintiff must then establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1115; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1450; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra*, 47 Cal.App.4th at pp. 784-785.) The Supreme Court has defined the probability of prevailing burden as follows: “[T]he plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [], quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 [].)” (*Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88-89; *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123.)

In reviewing the trial court’s order granting the motion, we use our independent judgment to determine whether the defendants were engaged in a protected activity



(*Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, *supra*, 65 Cal.App.4th at p. 721; *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5) and whether the plaintiffs met their burden of establishing a probability of prevailing on the claim. (*Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) The trial court can strike one or more causes of action and permit others to remain. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150.)

#### B. Defendants' Burden

The controlling issue in this case is whether the causes of action in plaintiffs' complaints arise from acts in furtherance of defendants' constitutional right of petition or free speech in connection with a public issue within the meaning of section 425.16, subdivision (b)(1). Although "a cause of action arguably may have been 'triggered' by protected activity," it does not mean that the action arose from that protected activity. (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78.) As the Supreme Court explained in *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at page 78: "In short, the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. (See *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at p. 1001, and cases cited.)" Thus, the fact that an action has been filed after protected activity has occurred does not automatically subject the cause of action to a special motion to strike because there is a mention of expressive or petition related conduct. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89; *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78.) The inquiry in this case must be whether the defendants'

protected conduct is the gravamen of the challenged cause of action. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89; *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 79.) In this case, the gravamen of the complaints is that defendants made false representations and failed to make adequate disclosures about audio discs they were selling to the public.

Defendants argue the trial court erred in determining they did not satisfy their burden of demonstrating section 425.16 applies to all of plaintiffs claims because: (1) they have a constitutionally protected right *not* to speak by making additional unwarranted disclosures; (2) the affirmative representations on the product labels and product advertisements are forms of commercial speech that are protected by the First Amendment; and (3) under a broad construction of section 425.16, the public interest requirement is satisfied because the complaints allege that the advertising and marketing activities impact a broad segment of the general public, involve a topic of widespread interest, and implicate speech activities about products that are themselves fully protected by the First Amendment. No doubt the United States Supreme Court has held that various forms of commercial speech are protected by the First Amendment. (*Lorillard Tobacco Co. v. Reilly*, *supra*, 533 U.S. at p. 553; *Rubin v. Coors Brewing Co.*, *supra*, 514 U.S. at p. 481; *Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, 425 U.S. at p. 762.) This includes the right not to speak. (*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 650-651; *Harper & Row v. Nation Enterprises*, *supra*, 471 U.S. at pp. 558-560.) However, the Supreme Court has held commercial speech is entitled to “less protection . . . than . . . other constitutionally safeguarded forms of expression.” (*Posadas de Puerto Rico Assoc. v. Tourism Co.* (1986) 478 U.S. 328, 349; *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64-65.) In *Zauderer v. Office of Disciplinary Counsel*, *supra*, 471 U.S. at page 638, the United States Supreme Court has stated: “Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, [citation], or that proposes an illegal transaction, [citation].” In *Kasky v. Nike, Inc.* (2002) 27 Cal.4th

939, 953, the California Supreme Court explained: “[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open” debate on public issues.’ (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340 [].) For this reason, ‘[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake.’ (*Va. Pharmacy Bd. v. Va. Consumer Council, supra*, 425 U.S. at p. 771 [].)”

In short, speech that involves “public deception” is “unprotected.” (*Illinois v. Telemarketing Associates, Inc.* (2003) 530 U.S. \_\_\_, \_\_\_ [123 S.Ct. 1829, 1836].) More specifically, for purposes of this case, commercial speech that is false, deceptive, or misleading is unprotected. (*Zauderer v. Office of Disciplinary Counsel, supra*, 471 U.S. at pp. 637-638 [states and the federal government have freedom to prevent dissemination of commercial speech that is false, deceptive or misleading]; *Bolger v. Youngs Drug Products Corp., supra*, 463 U.S. at p. 68; *Kasky v. Nike, Inc., supra*, 27 Cal.4th at pp. 967-969 [commercial speech which is allegedly false and misleading is not protected by the First Amendment].) In addition, section 425.16 may be inapplicable when a complaint is challenging speech contained in a product label which does nothing more than list the ingredients. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47 quoting *Kasky v. Nike, Inc., supra*, 27 Cal.4th at pp. 967, 969 [“factual statements about how [defendant] makes its products” is commercial speech which “may be regulated to prevent consumer deception”].)

In this case, the gravaman of the two complaints establishes that the claims did not arise from a protected activity. The two complaints allege that defendants made false representations and failed to make adequate disclosures about audio discs that they were selling to the public. Thus, the complaints allege that defendants’ conduct in selling the audio discs with a CD logo and without disclosures of the copy protection technology is deceptive and misleading. There is no constitutional protection afforded to defendants’ conduct in the dissemination of products which contain labels that are false, deceptive, or misleading. (*Zauderer v. Office of Disciplinary Counsel, supra*, 471 U.S. at p. 638; *Bolger v. Youngs Drug Products Corp., supra*, 463 U.S. at p. 68; *Kasky*

*v. Nike, Inc.*, *supra*, 27 Cal.4th at pp. 967-969 [commercial speech which is allegedly false and misleading is not protected by the First Amendment].) As a result, defendants' alleged misconduct is not a protected activity under section 425.16. (*Nagel v. Twin Laboratories, Inc.*, *supra*, 109 Cal.App.4th at p. 47 quoting *Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at pp. 967, 969.)

We disagree with defendants' claim its labels are subject to section 425.16 because it is speech in connection with a public issue or public interest. (See § 425.16, subds. (e)(3) & (e)(4); *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1117.) Defendants argue that the public interest requirement was established: by the allegations of the complaints which showed that "a broad segment of society" will be impacted by the sale of the audio discs; by allegations in the complaints that the nondisclosure of the copy protection technology has generated widespread media attention and internet discussion; and by the defendants' "First Amendment rights in the distribution and dissemination of their constitutionally protected works."

In support of the "broad segment of society" defendants rely upon a number of authorities, which have considered the amount of people that will allegedly be affected by speech involved in considering the public interest requirement. (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924-925 [public interest requirement not established by union fliers defaming a supervisor to eight individuals]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479 [3,000 homeowners affected by statements in an unofficial community paper was sufficient to satisfy public interest requirement]; *DuPont Merck Pharmaceutical Co. v. Superior Court*, *supra*, 78 Cal.App.4th at p. 567 [public interest requirement met where complaint alleged false statements to government agencies, the medical profession and to the public about a generic brand of Coumadin, an anti-coagulant medication, with 1.8 million consumers]; *Macias v. Hartwell*, *supra*, 55 Cal.App.4th at pp. 673-674 [challenged speech related to 10,000 union members satisfied public interest requirement].)

First, the mere fact that a large number of people may be affected by the commercial speech involving the sale of a product does not satisfy the public interest requirement as a matter of law. (*Nagel v. Twin Laboratories, Inc.*, *supra*, 109 Cal.App.4th at p. 50 [over three billion servings of a weight management product consumed a year did not establish public interest requirement because alleged false advertisement about product did not involve any noncommercial speech]; *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 602 [court would not rely on number of consumers for alleged false statements about herbal dietary supplement claiming it could increase the size of a woman's breast to conclude that no "true" public interest was involved]; see also *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34 [public interest requirement not met by calls made by a telemarketing firm and its employee to shareholders of a corporation resulting in action for false advertising, misappropriation of trade secrets, unfair business practices].) Rather, the inquiry becomes whether the defendants' labels are entitled to protection because they are inextricably intertwined with speech informing the consuming public and furthering political debate or discussion. (*Nagel v. Twin Laboratories, Inc.*, *supra*, 109 Cal.App.4th at p. 50.)

In *Consumer Justice Center v. Trimedica International, Inc.*, *supra*, 107 Cal.App.4th at page 602, the Court of Appeal held that "specific advertising statements" about what a product can do does not subject the speech to section 425.16 in the absence of facts which make it a matter of genuine public interest. As *Trimedica* explained: "The stated intent of [section 425.16] is 'to encourage continued participation in matters of public significance.' (§ 425.16, subd. (a).) No logical interpretation of this statement suggests that 'matters of public significance' includes specific advertising statements about a particular commercial product, absent facts which truly make that product a matter of genuine public interest, as was the case in *DuPont* [*Merck Pharmaceutical Co. v. Superior Court*, *supra*, 78 Cal.App.4th 562]. If we were to do so, nearly any product could claim its speech was about a topic of public interest. Construing the statute in this manner would allow every defendant in every

false advertising case (or nearly any case that involves any type of speech) to bring a special motion to strike under [section 425.16], even though it is obvious that the case was not filed for the purpose of chilling participation in matters of public interest. Because an order granting or denying the motion to strike is immediately appealable pursuant to section 425.16, subdivision (j), every such case would be delayed for a period of months or years while the appellate court used its scarce resources to consider any merit it might have. We do not believe the Legislature intended the statute to be construed in such a manner, and decline to do so.” (*Consumer Justice Center v. Trimedica International, Inc.*, *supra*, 107 Cal.App.4th at p. 602.) In short, specific advertising statements about a commercial product that do not truly involve a matter of public interest is not subject to the protection of section 425.16. (*Nagel v. Twin Laboratories, Inc.*, *supra*, 109 Cal.App.4th at p. 50; *Consumer Justice Center v. Trimedica International, Inc.*, *supra*, 107 Cal.App.4th at p. 602.)

Likewise in this case, the use of the CD logo and the failure to disclose the copy protection technology which may cause errors in playback devices involves specific advertisements about what the audio discs will do. It is not intertwined with speech about the merits of using the copy protection technology to protect any rights defendants may have in distributing its copyrighted materials. For that reason, we also disagree with defendants that the existence of copyrighted materials on the audio discs, which is itself subject to copyright protection, somehow elevates their labeling and marketing practices to a true matter of public interest.

To the extent that there is “speech” involved in labeling the audio discs for sale, it was not being made in the connection with a public issue or one of public interest. Plaintiffs are not challenging the content of the discs. Rather, the conduct being challenged is the alleged mislabeling of a product which is likely to mislead a consumer into believing that the content of the discs will play or can be duplicated on certain devices. Thus, defendants are alleged to have misrepresented what the audio discs are capable of doing by using the CD logo and selling the discs without disclosing the copy errors.

Furthermore, the fact that there is an ongoing debate about copy protection technology does not change the result. Defendants' conduct is based on alleged false or misleading labeling which is designed to fraudulently further sales of the audio discs; not to disseminate information or ideas. The use of the CD logo and the lack of information on the labels do nothing to encourage participation in the ongoing controversy, debates, and discussion. Certainly, truthful disclosures of accurate information might discourage consumers from purchasing the discs. But nothing on the labels would encourage consumers to participate in public discussions about the merits of copy protection technology. Rather, failing to disclose to potential consumers the existence of the copy protection technology on the discs arguably promotes consumer deception. As a result, the use of the CD logo and the lack of information about the copy protection technology involves nothing more than commercial speech that may be regulated to prevent consumer deception. (*Zauderer v. Office of Disciplinary Counsel*, *supra*, 471 U.S. at p. 638; *Bolger v. Youngs Drug Products Corp.*, *supra*, 463 U.S. at p. 68; *Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at pp. 967-969 [commercial speech which is allegedly false and misleading is not protected by the First Amendment].) Such conduct is also not a protected activity under section 425.16. (*Nagel v. Twin Laboratories, Inc.*, *supra*, 109 Cal.App.4th at p. 47 quoting *Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at pp. 967, 969.)

Defendants also raise a number of issues concerning the probability that plaintiffs will prevail on the merits including a preemption argument. But defendants did not meet their section 425.16, subdivision (b)(1) initial burden. Therefore, we need not address defendants' contentions that plaintiffs cannot establish a probability of prevailing on the merits. (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.*, *supra*, 110 Cal.App.4th at p. 32 [“if the moving defendant cannot meet the *threshold* showing, then the fact that he or she might be able to otherwise prevail on the merits under the ‘probability’ step is irrelevant” (original italics)].) Finally, our resolution of this appeals obviates the necessity of resolving numerous other issues posited by the parties.

#### IV. DISPOSITION

The orders denying the special motion to strike are affirmed. Plaintiffs, Matthew Dickey, Elizabeth Koluncich, David Keel, Josh Nichols, and Dennis Gregory, shall recover their costs incurred on appeal jointly and severally from defendants, Universal Music Group, Inc., BMG Music, Sony Music Entertainment Inc., Warner Music Group, Inc., and EMI Recorded Music, North America.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.